was well where it could correspond with that of an Individual state." *Quoted in* Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 NEW YORK HISTORY 438, 469 (1976). Accordingly, the district court properly characterized the State's conduct as "calculated disregard" of the Trade and Intercourse Act. App. 289a.

Following the 1795 Treaty, the State sold the acquired Cayuga lands at an average price of $4.50 per acre, more than twice the statutory minimum, and thereby realized a profit of $247,609.33. App. 280a. By contrast, the Cayugas received fifty cents an acre, a grossly inadequate sum by any standard. As the district court noted, the fact that private buyers were willing to bid nine times the price the State paid the Cayugas is conclusive evidence of inadequate consideration, and further evidence of the State's pattern of bad faith. App. 282a.

b. The State's Bad Faith With Regard to the 1807 Treaty

The State's conduct with regard to the 1807 Treaty was scarcely any better. The district court found that the State knowingly violated the requirement of the Trade and Intercourse Act for congressional approval. App. 293a. In 1807, the State appraised the Cayuga lands at approximately $4.50 per acre and then purchased them for $1.50 per acre, garnering a handsome profit at the Cayugas' expense. The State's bad faith concerning the 1807 Treaty thus consists of its knowing and willful violation of the Act on unconscionable terms to the permanent disadvantage of the Cayugas. App. 294a.

c. The State's Campaign to Avoid Fair Compensation

The State's bad faith in taking advantage of the Cayugas in the 1795 and 1807 treaties is compounded by its largely successful effort to defeat the Cayugas' attempts throughout the 19th and 20th centuries to obtain additional compensation from the state legislature for the taking of their lands. As chronicled by the district court, these efforts included the legislature's refusal to appropriate funds in response to a 1861 formal request presented by a chief of the Six Nations; the refusal to finalize and implement a 1906 settlement agreement to pay the Cayugas $297,131.20; the discontinuance of additional annuities in 1918; and the closure of state courts to claims by the Cayugas until relatively recently. App. 294a-298a. Viewing this record as a whole, the district court concluded that the State's "treatment of the Cayuga since 1807 is simply a continuation of its poor treatment of the Cayuga in the preceding years," (App. 300a) noting that State officials "often times refused to acknowledge [the State's] obligations to the Cayuga." App. 298a.

In its dealings with the Cayugas, New York State consistently defied the principle, as articulated by this Court, that "[o]nce the United States was organized and the Constitution adopted, these tribal rights to land became the exclusive province of the federal law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). Under no reasonable view of the facts could the State justifiably believe that its unlawfully obtained title to Cayuga lands would not be challenged if and when the courts opened to the Cayugas. The State knowingly violated the Trade and Intercourse Act, reaped enormous profits from its illegal acts and resisted efforts by the

Cayugas to obtain fair compensation. Surely under these circumstances the State is not prejudiced by the passage of time between the date of its wrongful acts and the Cayugas' day in court.

New York State's ill-treatment of the Cayugas was consistent with its conduct toward the other nations of the Six Nations Confederacy. Despite federal treaties and statutes protecting Six Nations land, the State pursued an aggressive policy of land acquisition, employing often unconscionable methods to extract land cessions from the Six Nations. The historical record shows, for example, that the State used deception and coercion in securing Indian land cessions;[6] reaped enormous profits by purchasing Indian land at a fraction of its value,[7] and routinely purchased Indian lands in knowing violation of the Trade and Intercourse Act.[8]

The court of appeals understood this Court's ruling in *Sherrill* to have altered the law applicable to time-bars for Indian land claims. On the contrary, *Sherrill* was not an Indian land claim and did not modify the bedrock principle established by this Court that laches cannot be invoked by

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[6] *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1078 (2d Cir. 1982) (In securing the purchase of five million acres of Oneida land, Governor Clinton "gave repeated assurances that New York's aim was only to protect the Indian land and not to purchase it, and the Oneidas believed that the treaty restored their lands to them and only leased or entrusted certain portions to the State for their own protection.")

[7] Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* 165 (2006). Professor Taylor concluded that between 1790 and 1795, "nearly half of the state's revenue came from selling land recently obtained from the Indians." *Id.* at 201.

[8] Lawrence M. Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* 74-78 (1999) (summarizing dispossession of Onondaga Nation and Oneida Nation).

a party guilty of bad faith in its dealings with the claimant. *Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946). The State of New York's bad faith in its treatment of the Cayugas precludes application of the equitable considerations identified in *Sherrill.* Review is warranted to correct the grave error committed by the court of appeals in failing to take into account the State's bad faith, as found by the district court, and applying laches to bar completely the Cayugas' claims.

II. Review is Necessary Because the Court of Appeals Failed to Apply the Rule Established by This Court That Laches Cannot Be Applied Where Legal or Practical Obstacles Prevented the Plaintiff From Bringing Suit Earlier.

Fundamental to any laches determination -- long established in this Court's decisions – is the principle that a delay in filing suit cannot be deemed unreasonable if the party did not have an adequate and effective opportunity to assert its rights in a court with jurisdiction to hear the claim. *Galliher v. Cadwell,* 145 U.S. 368 (1892) (laches can be imputed only when the party against whom it is asserted has knowledge of his rights and "an ample opportunity to establish them in a proper forum"); *Ewert v. Bluejacket,* 259 U.S. 129, 138 (1922) ("[T]he equitable doctrine of laches, developed and designed to protect goodfaith [sic] transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed. . . .").[9]

[9] *Felix v. Patrick,* 145 U.S. 317 (1892) is not to the contrary, because, unlike Indians in New York State, in that case the Indian party had ample opportunity to assert its rights in the courts of Nebraska.

The courts of the United States were closed to the Cayugas for more than 184 years. The Cayugas filed suit in 1980, within a few years of this Court's decision in *Oneida I*, which upheld for the first time the jurisdiction of the federal courts to hear claims based on the Trade and Intercourse Act. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). The settled law of laches precludes its application when federal and state courts were closed to Indian tribes for virtually the entire period from the State's acquisition of Cayuga land to the filing of this suit. Because the court of appeals overlooked this fact and declined to follow binding Supreme Court precedent, this Court should review the decision.

From the founding of the United States until well into the 20th century, Indian nations lacked capacity to sue in their own names except where that right was specifically provided by statute. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), this Court decisively rejected efforts by Indian nations to surmount this barrier by invoking the original jurisdiction of the Supreme Court as foreign nations. Particularly during the latter decades of the 1800s, the so-called "wardship" status of Indian nations disabled them from suing in the courts of the United States in their own name. For example, in *Felix v. Patrick*, 145 U.S. 317, 330-331 (1892), this Court tied the incapacity of Indians to sue to their lack of American citizenship and status as "wards of the nation." This Court recognized this lack of capacity to sue in *Seneca Nation v. Christy*, 162 U.S. 283, 289 (1896), noting that prior to the enactment of a state authorizing statute, the Seneca Nation lacked such capacity, citing *Strong v. Waterman*, 11 Paige Ch. 607 (1845). This Court described the Seneca Nation's lack of capacity in these terms: "no provision was made by law for

bringing an ejectment action to recover the possession of such lands for their benefit, nor could they maintain an action at law, in the name of their tribe, to recover damages sustained by them by reason of trespasses committed on their reservations. . . ."; *see also Heckman v. United States*, 224 U.S. 413, 446 (1912) (suggesting that Indian "wards" do not have capacity to sue when the United States as trustee has sued on their behalf).

The courts of New York State also denied Indian tribes capacity to sue in the absence of authorizing legislation. *Johnson v. Long Island R.R. Co.*, 56 N.E. 992 (N.Y. 1900) (Indian tribes lack capacity to sue in the absence of a statute); *King v. Warner*, 137 N.Y.S.2d 568, 569 (Sup. Ct. Suffolk County 1953) (characterizing precedents denying Indian tribes the right to sue in absence of a statute as "many and impressive.")[10] In 1953, New York enacted a statute that arguably recognized the capacity of Indian nations to sue, but ambiguities about the effect of the statute were not resolved until 1987. *Oneida Indian Nation of New York v. Burr*, 132 A.D.2d 402 (3d Dept. 1987).

Even if Indian nations had been able to overcome these obstacles, they nonetheless faced insurmountable jurisdictional barriers. For example, federal courts were not granted general federal question jurisdiction until 1875. *County of Oneida v. Oneida Indian Nation*, 470 U.S.

[10] In those rare cases where statutes were enacted authorizing such suits, the state legislature often required the Governor to appoint an attorney with exclusive authority to bring suit in his own name on behalf of the Indians "whose interests are committed to him." *Jackson ex dem. Van Dyke v. Reynolds*, 14 Johns. 335, 336 (N.Y. Sup. Ct. 1817). The requirement of the Governor's approval no doubt had a chilling effect on statutory suits by such attorneys against the State of New York for land rights violations.

226, 255, n.1 (1985) (Stevens, J. dissenting).[11] Even after federal question jurisdiction was established, the federal courts remained closed to tribal claims based on the Trade and Intercourse Act until 1974, when this Court decided *County of Oneida v. Oneida Indian Nation*, 414 U.S. 661 (1974) (upholding federal question jurisdiction for Trade and Intercourse Act claims). Before then, the prevailing law on federal court jurisdiction was *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929), which held that such courts had no jurisdiction over a Mohawk claim to recover possession of lands obtained by the State of New York in violation of the Trade and Intercourse Act.

State courts likewise remained closed to tribal land claims based on violations of the Trade and Intercourse Act. During most of the relevant period, state courts generally lacked jurisdiction over Indian land claims in the absence of authorizing legislation by Congress. *Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916, 923, n.9 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974). With respect to New York State, Congress has specifically declined to extend jurisdiction over Indian land claims to state courts. 25 U.S.C. § 233 (authorizing New York State courts to hear civil actions involving Indians, but expressly withholding jurisdiction "involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."); *see also Seneca Nation of New York v. Christy*, 126 N.Y. 122, 140 (1891), *aff'd on other grounds*, 162 U.S. 283

[11] Diversity of citizenship has never been a basis for federal court jurisdiction over tribal claims because Indian tribes have never been considered citizens for purposes of diversity jurisdiction. *See, e.g., Romanella v. Howard*, 114 F.3d 15, 16 (2d Cir. 1997).

(1896) (New York State could acquire Indian lands to which it held "right of preemption" without violating federal law).[12]

Suits by the United States on behalf of Indian nations were likewise rarely available. The shifting federal policies with regard to the protection of Indian rights made it nearly impossible to persuade the United States to undertake such action. *See generally Cohen's Handbook of Federal Indian Law* 45-97 (Nell Jessup Newton, et al. eds, 2005) 45-97 (discussing evolution of federal policy beginning with removal, continuing through allotment, assimilation, and termination, and culminating with self-determination in the 1970s). Because of inconsistent federal polices, for many decades, Indian nations could not reliably look to federal officials to file suit to protect their rights when the Indian nations themselves could not do so.[13] In the rare case when the United States did file suit, the courts invariably held that tribal rights under the Trade and Intercourse Act could not be enforced against the State of New York. *United States v. Franklin County,* 50 F. Supp. 152 (N.D. N.Y. 1943) (Trade and Intercourse Act does not apply to land transactions between the State of New York and Indian tribes).

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[12] State laws generally disadvantaged Indians seeking justice in state courts by excluding them from juries or declaring them incompetent as witnesses. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. Pa. L. Rev. 195, 217 (1984).

[13] President George Washington's promise to Cornplanter, Chief of the Seneca Nation, on December 29, 1790, shortly after the Trade and Intercourse Act was passed, that the United States "will be your security that you shall not be defrauded in the bargain you make" with regard to the lands of the Six Nations has not been fulfilled. 4 *American State Papers* 142 (1832).

Moreover, even if the courts had been open, Indian nations faced enormous practical obstacles to filing suit, such as lack of financial resources, unfamiliarity with the English language, inability to retain attorneys, and unfamiliarity with the American legal system. *See* Katherine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 Vill. L. Rev. 525, 537 (1994). These nearly insurmountable obstacles to relief are critical to a fair determination of whether any opportunities the Cayugas may have had to assert claims in court were adequate, much less "ample," as required by this Court's precedents. *Ewert v. Bluejacket*, 259 U.S. at 138.

Not until 1966 were these jurisdictional and juridical barriers even partially overcome. In that year, Congress enacted 28 U.S.C. § 1362, which "opened federal courts to the kinds of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976). By authorizing federal courts to hear claims brought by Indian tribes themselves, Congress implicitly recognized the pervasive problem that tribes lacked capacity to sue before 1966. Even after the enactment of the jurisdictional statute, however, the ability of Indian nations to enforce the requirements of the Trade and Intercourse Act against the State and private parties was still not possible because of cases like *Deere v. St. Lawrence River Power Company*. The first Indian tribal claim brought under the Trade and Intercourse Act was dismissed for lack of a federal question. *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972). That decision was overturned by this Court in 1974 in *Oneida I. County of Oneida v. Oneida Indian Nation*, 414

U.S. 661 (1974). Moreover, the right of Indian nations to seek judicial remedies for violations of the Trade and Intercourse Act was not firmly established until this Court's decision in *Oneida II* in 1985. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Under these circumstances, it is not surprising that the district court could "not find that the Cayuga are responsible for any delay in bringing this action."[14] App. 302a. Rather, the delay in filing this suit "was not unreasonable insofar as the actions of the Cayuga are concerned." App. 302a. The law is clear that for the purposes of the laches determination, a party is fully justified in awaiting more favorable legal developments before filing suit. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), *rev'd on other grounds*, 514 U.S. 645 (1995) (party has legitimate reason to delay filing suit until prospects for success improved with new Supreme Court precedent, especially when prior law "created little hope of success"). The court of appeals' decision thus creates a new rule of laches, applicable only to Indian claims, particularly Indian land claims, that a party is chargeable with laches even if filing suit would have been futile. Such a dramatic departure from this Court's settled precedents warrants review.

CONCLUSION

The district court's exhaustive review of the historical records shows that New York State was guilty of bad faith

[14] The district court nonetheless took the passage of time into account in reducing the prejudgment interest award by 60% because "[a]llowing recovery for 200 years of compounded prejudgment interest would offend this court's sense of fundamental fairness." App. 320a.

in its dealings with the Cayugas and their lands. Federal and state courts were not available to the Cayugas to seek redress for Trade and Intercourse Act violations until shortly before this lawsuit was filed. Review is warranted because the court of appeals dramatically departed from the established doctrine of laches in barring the Cayugas' claims. For these reasons, the petitions of the Cayuga Indian plaintiffs and the United States for a writ of certiorari should be granted.

Date: April 7, 2006

Respectfully submitted,

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(5)

Nos. 05-982 and 05-978

In The Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, et al.,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR, et al.,

Respondents.

UNITED STATES,

Petitioner,

v.

GEORGE PATAKI, GOVERNOR, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS BRIEF OF ST. REGIS MOHAWK TRIBE AND MOHAWK COUNCIL OF AKWESASNE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI

The St. Regis Mohawk Tribe and the Mohawk Council of Akwesasne ("Amici") are two of the three Mohawk plaintiffs with a land claim pending before the Northern District of New York, a claim similar to that filed by the Cayuga Indian Nation and the Seneca-Cayuga Indian Tribe. *See Canadian St. Regis Band of Indians v. New York*, 82-cv-783, 82-cv-1114, 89-cv-829. Amici are likely subject to the Second Circuit's ruling on the Cayuga claims and have an interest in this Court's review of this case. Review of the decision is of extraordinary importance to Amici and all similarly situated tribes seeking a monetary remedy for past trespass on Indian lands. Amici file this brief in support of the petitions for writ of certiorari.[1]

REASONS FOR GRANTING THE PETITION

Review should be granted because the Second Circuit's ruling conflicts with 28 U.S.C. § 2415(b), which sets forth the statute of limitations for Indian claims for money damages, and this Court's interpretation of that statute in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*").

When Congress enacted 28 U.S.C. § 2415(b) and its amendment, the Indian Claims Limitation Act of 1982, 28

[1] Counsel of record for all parties have consented to the filing of this Brief and their consents are filed herewith. No counsel for any party authored this brief in whole or in part, and no one other than amici made any monetary contribution to the preparation or submission of this brief. The St. Regis Mohawk Tribe is a federally recognized tribe. The Mohawk Council of Akwesasne is a tribal government recognized by the government of Canada.

U.S.C. § 2415 note, it imposed for the first time a statute of limitations on tribes and the federal government for Indian land claims for trespass damages. The statute set the deadline for the filing of specific listed Indian claims for money damages and defined the accrual dates for these Indian claims as of the date of the enactment of § 2415. This Act is key in determining whether tribes have the current right to pursue land claims without regard to the operation of the equitable doctrine of laches.

The Indian Claims Limitations Act was enacted after a lengthy policy debate regarding Indian land claims. Congress was well aware of the nature of the claims, the fact that they were old, and the fact that they could have an impact on local communities. Congress also fully understood that Eastern land claims were involved in this effort and, indeed, there are specific references throughout the record to claims pending or about to be filed in New York, including claims for the Cayuga, the Oneida, and the St. Regis Mohawk Tribe. Faced with a choice between leaving tribes without a remedy for violations of federal statutes and treaties, or disturbing the expectations of present-day land owners, Congress opted to preserve the judicial remedy for the tribes. The Second Circuit decision conflicts with, and indeed dismisses out of hand, this very clear and carefully crafted statutory framework Congress devised under § 2415. The Executive and Legislative Branches spent millions of dollars and worked for over 15 years to identify and preserve possible Indian claims. The judicial branches have spent over 30 years addressing these same claims on the assumption that some remedy was due. The Second Circuit's decision to dismiss the same claims on laches grounds renders these efforts a complete waste of time and resources.

The Second Circuit need not have reached this point had it adhered to this Court's holding in *Oneida II* which found that Congress, having spoken in § 2415, precluded the application of common law time bars, such as the borrowing of the state statute of limitations to such claims. This Court reasoned that "[i]t would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances." *Oneida II*, 470 U.S. at 244. Yet, the Second Circuit refused to apply the *Oneida II* analysis. In so doing, it violated the principle, which is fully supported by controlling decisions of this Court, that when Congress specifically addresses by statute a question previously governed by common law, the statute controls. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

ARGUMENT

A. Review Is Warranted Since Congress Addressed the Statute of Limitations for These Claims When Congress Enacted 28 U.S.C. § 2415 and the Indian Claims Limitation Act of 1982.

1. Claims on Behalf of Indian Tribes Had No Limitations Period in Law or Equity Prior to the Passage of 28 U.S.C. § 2415.

Prior to 1966, the United States was not subject to any statute of limitations on claims at law including

Indian claims.[2] Perceiving an inequity, in 1966 Congress enacted 28 U.S.C. § 2415, which set forth for the first time a general statute of limitations for claims made by the United States in contract or tort.[3] The law provides for a six-year statute of limitations measured from the accrual date set by the Act. Section 2415(g) provides that "[a]ny right of action subject to the provisions of this section which accrued prior to the date of the enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act." 28 U.S.C. § 2415(g). This language recognizes that claims may have factually accrued much earlier but since the United States was not subject to a limitations cut off, that accrual of

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[2] When Congress enacted § 2415, it was considered settled law that neither the statute of limitations nor laches applied to the United States unless Congress had clearly manifested an intention to the contrary. In *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120 (1886), this Court considered whether limitations barred an action by the United States to protect securities that were being held in trust by the United States on behalf of the Chickasaw Nation. The Court found the United States was asserting its sovereign rights and that protection of tribal trust assets was "a public use in the highest sense." *Id.* at 126. As such the U.S. was not bound by any statute of limitations "unless congress has clearly manifested its intention that they should be so bound." *Id.* at 125 (citations omitted). In *United States v. Insley*, 130 U.S. 263 (1889), this Court made it clear that, "[t]his doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity." *Id.* at 266 (citing *United States v. Beebe*, 127 U.S. 338 (1888)); *see also Societe Suisse Pour Valeurs De Metaux v. Cummings*, 99 F.2d 387, 395 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 631 (1939) ("We think there is no basis for the claim of laches on the part of the government. No rule is better established than that the United States are not bound by limitations or barred by laches where they are asserting a public right.").

[3] H.R. REP. NO. 96-807, at 3 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 206, 208.

facts had no effect. The statute addressed this problem by providing a time certain from which claims of the United States had to be filed by deeming those claims accrued as of the date of the Act.

Generally, the United States has a trust duty to protect Indian land and this duty includes filing suit when necessary to vindicate Indian land rights under federal law.[4] In 1972, as the initial statute of limitations date approached, the Department of the Interior ("DOI") realized that many substantial Indian claims would be time barred. These Indian claims had not been prosecuted by the federal government despite its trust duty to do so. Once it assessed the situation, the Department asked that the limitations period be extended so that some "very complicated and substantial claims for damages" not become barred. S. REP. NO. 92-1253 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3592, 3593. The Department feared that, without the extension, it could be liable for a breach of trust for failing to pursue claims on behalf of its Indian wards.[5]

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[4] *See* discussion of federal trust duty in regard to these claims in H.R. REP. NO. 96-807, at 2-3 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 206, 207-208.

[5] *See, e.g.*, H.R. REP. NO. 96-807, at 4 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 206, 209 ("Finally, it was pointed out that if the statute is not extended, those Indians whose claims would be barred by the statute may have a cause of action against the United States for a breach of its fiduciary duty as trustee for the Indians.").

2. The Government Expended Millions of Dollars and Years of Effort to Investigate Newly Limited Claims, and It Extended the Limitations Period to Preserve Them.

From that moment, a massive effort was undertaken by the Department to identify potential Indian claims and to further determine if the United States needed to file claims prior to the limitations deadline. Evidence was collected throughout the country and litigation reports were prepared by the Department for consideration by the Department of Justice ("DOJ").[6] One major concern was that without this assessment, and without the extension of the statute, protective lawsuits would have to be filed to preserve the claims and to carry out the trust responsibility, a result that would impact thousands of individuals[7]

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[6] *See, e.g.*, H.R. REP. NO. 95-375, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1616, 1618 (" . . . hundreds of the pre-1966 claims are still being researched and identified and cannot all be filed by July 1977."); S. REP. NO. 96-569, at 8 (1980) (An "all-out search . . . was conducted in the summer of 1979. By the end of the summer we had uncovered a large number of potential claims, over 4,500. The potential claims continued to arrive, and by December 1, 1979, our count of identified potential claims reached a grand total of 9,768. * * * We managed to resolve over 2,700 of the grand total mentioned above either by rejection or by successful resolution of the claim to the benefit of the Indian claimants. To date we have referred about 100 litigation reports to the Department of Justice covering about 2,000 claims.")

[7] *See, e.g., Statute of Limitations Extension for Indian Claims: Hearings before the U.S. Senate Select Comm. on Indian Affairs on S. 1377*, 95th Cong. 69 (May 3 and 16, 1977) (hereafter "1977 Hearings") (statement of Chairman Abourezk) (Because the statute might lapse, "the Government is presently preparing to file as many claims as possible. The effect of this approach will undoubtedly result in economic hardship in many communities . . . due to the clouded title which will follow the institution of these lawsuits."); 126 CONG. REC. 5746 (1980) (statement of Rep. Mitchell) ("The failure to extend the statute of

(Continued on following page)

and in many instances unnecessarily so since, once investigated, many claims were rejected as without merit.[8] Congress extended the limitations period three times to December 31, 1982, giving the DOI and the DOJ over fifteen years to identify Indian claims so that they would not be time barred.

3. Congress Was Aware of the Nature of the Claims and Acted to Preserve Them.

When addressing how § 2415 would apply to Indian claims, Congress acted at a time when the Eastern land claims based on violations of the Nonintercourse Act were percolating through the courts. This Court had decided *Oneida I* in 1974, which for the first time recognized the right of tribes to sue for violations of the Nonintercourse Act, 25 U.S.C. § 177. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Claims had been filed in Maine. The record before Congress was replete with references to the Eastern land claims and Congress understood that the claims were controversial, dating back hundreds of years. Yet, Congress never expressed any doubts that these claims remained untouched by any time

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limitations would mean that landowners will be dragged into years of burdensome and costly litigation.")

[8] S. REP. NO. 96-569, at 5 (1980) ("Failure to extend the time limits now provided will, unnecessarily, bar many meritorious claims of Indian tribes and individuals; it will cause the filing of a multitude of lawsuits which might be rejected if adequate time is allowed for administrative review on the merits; and it will deprive the United States of adequate opportunity to negotiate settlements outside of court."). As of 1980, over 4,100 claims were rejected by the DOI "as worthless." H.R. REP. NO. 96-807, at 9 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 206, 213.

bar. Instead, Congress weighed the nature of the claims against the right of the Indians to have their day in court and chose to give the tribes an opportunity to pursue them.

a. Discussion of Eastern Land Claims. When asked in hearings the nature of the claims being considered by the Department, then-Interior Solicitor Leo Krulitz testified, "Probably the largest and most complex are the land claims." 1977 Hearings at 6. Mr. Krulitz also included in the record a list of claims that would be barred by the statute absent an extension. This list includes claims for the Oneida, the Cayuga and "On behalf of: St. Regis Mohawk Tribe; Claim: Non-Intercourse Act claim for recovery of tribal lands; Defendants: New York and individual titleholders." *Id.* at 24. *See also id.* at 33 (testimony of Asst. Attorney General Peter Taft, DOJ) ("[I]f the statute is not extended, we will have no choice but to file this very massive lawsuit in Maine and perhaps similar ones in New York, which we are now working on."). Representative William Cohen noted in 1977 that major land claims were being considered, including claims for the St. Regis Mohawks, the Oneida, and the Cayuga. 123 CONG. REC. 22,165 (1977).

In 1980, Forrest Gerard, then-Assistant Secretary for Indian Affairs, stated in a letter to the Senate Committee on Indian Affairs, that "The so-called eastern land claims, like many of the smaller land title cases, have tort damage aspects subject to the statute of limitations. These claims are also included in our claims program. This committee is well aware of the magnitude of the eastern land claims and the effect such claims are having in the jurisdictions where they may be litigated." S. REP. NO. 96-569, at 9 (1980).